Office - Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS
CLERK

No. 84-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *et al.*,
Petitioners,

v.

DIANA SPIRT *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

ANN H. FRANKE
LAWRENCE WHITE
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

JOHN L. POTTENGER, JR.
(Counsel of Record)
Yale Law School
Box 401A Yale Station
New Haven, CT 06520
(203) 436-2210

Counsel for the American Association of University Professors

Of Counsel:
RALPH S. BROWN
127 Wall Street
New Haven, CT 06520

August, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Was the order of the court below requiring the petitioners to determine periodic pension benefits on a sex-neutral basis for male and female employees retiring after May 1, 1980, consistent with the equitable remedial principles elucidated by this Court in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam)?

2. In light of the reasons for which the petitioners were established as educational service organizations, the close mutual dependence between the petitioners and participating educational institutions, and the broad remedial purposes for which Congress enacted Title VII of the Civil Rights Act of 1964, did the court below correctly determine that the petitioners were subject to the nondiscrimination provisions in Section 703(a)(1) of that Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. The Remedy Fashioned by the Court Below is Consistent with the Equitable Remedial Principles Elucidated in *Arizona Governing Committee v. Norris*	10
II. The Decision of the Court Below on Liability Issues is Not in Conflict with the Decision of Any Other Federal Appellate Court	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 10, 11, 14
Arizona Governing Committee v. Norris, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam) ..... *passim*
Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983) 18-19
Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977) 19
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 11
Cipriano v. City of Houma, Louisiana, 395 U.S. 701 (1969) (per curiam) 11
Hecht Co. v. Bowles, 321 U.S. 321 (1944) 17
Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) 8, 11, 15
Peters v. Wayne State University, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded mem.*, 463 U.S. ——, 103 S.Ct. 3566 (1983), *remanded mem.*, 718 F.2d 1100 (6th Cir. 1983) 6, 18
Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974) 19
Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) 19
Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979) 19

Statutes and Legislative History:

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982) 6
§ 701, 42 U.S.C. § 2000e 19
§ 703, 42 U.S.C. § 2000e-2 ..... i, 19
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) 6
McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.* (1982) 9
118 CONG. REC. 7168 (1972) 10

TABLE OF AUTHORITIES—Continued

Other Authority:

Page

U.S. DEP'T OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS (1983) 16-17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-50

TEACHERS INSURANCE AND ANNUITY ASSOCIATION *et al.*,
Petitioners,

v.

DIANA SPIRT *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN OPPOSITION

The American Association of University Professors ("AAUP"), respondent in this Court, respectfully urges that the petition for writ of certiorari filed by the Teachers Insurance and Annuity Association and the College Retirement Equities Fund (respectively "TIAA" and "CREF" and collectively "TIAA-CREF") be denied.

STATEMENT OF THE CASE

In two respects, the petitioners' statement calls for supplementation.

A. *The Cost and Practical Effect of the Remedy Ordered by the Courts Below.* The petition exaggerates the practical ramifications of the remedy fashioned by the trial and appellate courts below.

Those courts enjoined TIAA-CREF from using gender-based mortality tables to calculate annuity benefits for any plan participant retiring after May 1, 1980.[1] The petition asserts that the implementation of this remedy will mean a "reduction in men's benefits" of as much as eight percent a month,[2] a result the petitioners call "staggering."[3] Yet, as the court below correctly observed, the remedy will have no negative impact on the retirement benefits of the three-fifths of all male participants who have elected the joint-life option and whose annuity payments have long been calculated using the functional equivalent of sex-neutral mortality tables.[4] As for the minority of male participants who elect the single-life option, data contained in the record show that TIAA-CREF could painlessly comply with the remedial order and equalize benefits for men and women retiring after May 1, 1980, simply by reallocating a miniscule fraction —something less than two percent—of the four hundred million dollars of discretionary dividend income earned by TIAA-CREF each year.[5] This reallocation could occur

---

[1] That date was selected because it was the approximate end of the 1979-80 academic year. The trial court's decision was rendered on August 9, 1979, but was stayed "until the termination of the 1979-80 academic year" in order to give TIAA-CREF time to recompute annuity units on a sex-neutral basis. Pet. App. 88a. (As used in this footnote and hereinafter, the abbreviation "Pet." refers to the petition for certiorari filed by TIAA-CREF in this Court; the abbreviation "Pet. App." refers to the appendix accompanying the petition for certiorari; and the abbreviation "J.A." refers to the Joint Appendix submitted by the parties in the court below.)

[2] Pet. 14, 15.

[3] Pet. 14.

[4] Pet. App. 6a. The record, in fact, supports an even broader conclusion: for most men, the adoption of merged-gender mortality tables will actually *increase* their monthly retirement benefit. *See* J.A. 550, 590, 592.

[5] *See* J.A. 587-93.

without imposing any additional financial burden on either TIAA-CREF or the colleges and universities that have adopted TIAA-CREF retirement plans.

It is this concept of *discretionary dividend income* that distinguishes the TIAA-CREF plan from other pension plans. Unlike many other pension plan operators offering fixed-dollar annuities, TIAA-CREF makes no contractual commitment to its participants to invest contributions at a rate of return approximating the market rate. Instead, TIAA-CREF guarantees only that benefit levels will reflect a minimum two and a half percent return on investment.[6] Because TIAA-CREF can invest participant contributions at an interest rate substantially in excess of the contractual guarantee, TIAA-CREF earns enormous sums each year in discretionary interest income. Most of this income is normally returned to participants in the form of additional investment dividends. TIAA-CREF participants hope that their investments will earn income at something approximating market rates, but they have no entitlement to premiums beyond the extremely modest contractual minimum.

During their working years, TIAA-CREF participants do not know what their monthly benefits will be after retirement. It is not *until* retirement, when the participant's contract with TIAA is "settled" and converted into a life annuity, that he or she is first guaranteed a fixed-dollar retirement benefit and the amount of the benefit is actually calculated.[7] TIAA cautions participants that

---

[6] Pet. App. 35a. *See* J.A. 197.

[7] Pet. App. 15a. This distinctive feature of the TIAA-CREF retirement plan is an important factual predicate for the remedy fashioned by the trial court and court of appeals in this case. During a faculty member's worklife, amounts contributed by the employer and matching amounts, if any, paid by the employee are credited to an individual account maintained in the faculty member's name by TIAA-CREF. The amount of the employer's contribution is determined formulaically. For example, Long Island University, which employs the plaintiff in this action, contributes

it cannot accurately predict the amount of retirement income an individual participant should expect:

> The amount of your retirement income will depend on the number of years you participate in the plan, the amount of premiums paid each year during your participation, your age at time of retirement, the experience of TIAA and CREF, the income option you select at retirement, and other factors. . . . [I]t is not possible to predict the effect of each of these factors upon your retirement income. . . .[8]

Thus, TIAA-CREF misspeaks when it asserts that "benefits, previously vested, will be lost" by male participants under the remedy fashioned by the courts below.[9] The only entitlement that "vests" during a participant's worklife is an ownership interest in *some* benefit, the precise amount to be determined upon retirement. As the court below observed:

> [W]e must reject the argument that an award of relief that adversely affects the value of contributions made by or on behalf of male employees prior to the date of the order herein will unfairly violate those males' expectations of receiving pension benefits based on mortality tables that discriminate in

---

five percent of the first $4,800 of a professor's salary and eleven percent of all earnings in excess of $4,800 (Pet. App. 14a.) There is no discrimination against female faculty members in this first, or "pay-in," phase of the TIAA-CREF plan; a man and woman of the same age with identical employment histories will have accumulated the same amounts in their individual accounts by the time they reach retirement age. (Pet. 4; *see* J.A. 175.)

The discrimination occurs only when the faculty member retires, and it continues throughout the second, or "pay-out," phase, when sex-distinct mortality tables are used to convert the faculty member's accumulation into a life annuity. It is at this stage that female retirees are first treated differently than comparably situated males; females receive smaller monthly benefits. (Pet. App. 14a-16a, 85a-86a.)

[8] J.A. 233, cited and quoted by the court below at Pet. App. 34a-35a.

[9] Pet. 14.

> their favor. . . . [T]his argument assumes that male employees had some *clearly settled* expectations that *will be* violated. On the contrary, the literature distributed to TIAA-CREF participants emphasizes the difficulty involved in accurately predicting the amount of retirement annuity income to be expected by an individual participant. . . . While TIAA does guarantee its participants certain minimal monthly payments, the amounts guaranteed are so low—since they are figured on the basis of a 2½% return on investments—that there is no danger that the male participants' expectation that they will receive the minimal guaranteed benefit will be jeopardized by the relatively minor changes in the value of past benefits necessitated by the relief ordered herein.[10]

In sum, the majority of male participants will not be adversely affected by the remedy, and no male, affected or not, will lose benefits that were "previously vested." In practical terms, it will be difficult, if not impossible, to attribute a precise effect to the remedy in light of the many uncertainties that shroud the eventual calculation of annuitants' benefits under the TIAA-CREF plan.

Finally, it is not accurate to state, as TIAA-CREF does in its petition, that male participants were not represented at any level of the proceedings below.[11] Thousands of AAUP members are men.[12] Most participate in TIAA-CREF, a fact that was deemed germane by the trial court when it granted the AAUP's motion to intervene in this case.[13] Although the AAUP does not presume to speak for all men who participate in the TIAA-CREF retirement plan, our participation has served to

---

[10] Pet. App. 34a-35a (emphasis in the original; record citation omitted).

[11] Pet. 14.

[12] Pet. App. 6a. Approximately 80 percent of the AAUP's 60,000 members are men. *Brief of Intervenor-Appellee American Association of University Professors* 6, submitted in this case in the court below on June 2, 1982.

[13] *See* Pet. App. 121a.

ensure that the views of male participants were articulated and explained in the courts below.

B. *The TIAA-CREF Annuity System.* The petitioners describe themselves as "independent insurers" having no employer-employee relationship with their annuitants,[14] an assertion vital to their legal contention that they are not subject to the nondiscrimination provisions in Title VII of the Civil Rights Act of 1964.[15] In fact, the history of the TIAA-CREF annuity system and the manner in which the system is currently structured suggest a more intimate relationship between the petitioners and their annuitants than the one described in the petition.

TIAA-CREF provides annuity benefits to faculty members at most institutions of higher education in the United States. In all, 3,400 colleges and universities have coordinated the design and administration of their retirement programs with TIAA-CREF, creating what the petitioners have called a "national pension system of [American] higher education." [16]

The TIAA-CREF system was originally conceived and is today operated as a financial service to make careers in higher education more attractive and financially rewarding.[17] TIAA-CREF annuities are available only to faculty members and staff employees at American in-

---

[14] Pet. i, 16.

[15] 42 U.S.C. § 2000e *et seq.* (1982), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[16] J.A. 330. In advertisements directed at college and university faculty members, TIAA-CREF characterizes itself as "an integral part of higher education." J.A. 415.

[17] J.A. 172, 226, 251-54, 329. For a description of the history of TIAA-CREF, *see Peters v. Wayne State University*, 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded mem.*, 463 U.S. ——, 103 S.Ct. 3566 (1983), *remanded mem.*, 718 F.2d 1100 (6th Cir. 1983).

stitutions of higher education and qualifying educational organizations. TIAA-CREF annuities cannot be purchased on the open market.[18]

Each plan in the TIAA-CREF system is established by resolution of the educational institution's governing board. Within limits established by TIAA-CREF, the institution determines for itself what provisions on eligibility, participation, contributions, and retirement it wishes to include in its plan. At many institutions (including Long Island University), tenured faculty members are required to participate in the TIAA-CREF plan and must, therefore, depend on TIAA-CREF for investment and payment services.[19] Unlike many pension plans —and, specifically, unlike the deferred compensation plan that was before the Court last year in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam)—the TIAA-CREF plan does not offer participants the option of withdrawing the full amount of their contributions in a lump sum and purchasing an annuity on the open market from another underwriter.[20]

In all these respects, the TIAA-CREF retirement plan differs significantly from the deferred compensation plan in *Arizona Governing Committee v. Norris*. In contrast to the arm's-length relationship between the employer and third-party insurers in *Norris*, the relationship between college employers and TIAA-CREF is extraordinarily close, the product of TIAA-CREF's history and the unique configuration of its national pension system. This unique relationship led the court below to conclude that the activities of TIAA-CREF "are so closely inter-

---

[18] J.A. 226, 238, 470, 473.

[19] *See* J.A. 188-193.

[20] Pet. App. 15a n.2.

twined" with college and university employers that they function as one entity for Title VII purposes.[21]

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice in the last six years, this Court has been called upon to decide whether an employer-operated pension plan illegally discriminates against female participants by using sex-segregated mortality tables to set different contribution or benefit levels for employees depending on their gender. In *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court held that Title VII prohibited an employer from requiring larger pension contributions from female employees than males in order to provide comparable periodic annuity benefits to retirees of both sexes. The Court, however, declined to apply its holding retroactively. Noting that retroactive relief was "not to be awarded automatically in every case," 435 U.S. at 719, the Court identified several equitable reasons why prospective application of its holding was appropriate, including the lack of advance warning that reliance on sex-segregated tables would be declared illegal and the potential impact of the ruling on the financial integrity of the municipal pension plan challenged in *Manhart* and the pension industry in general. *Id.* at 719-23.

Five years later, in *Arizona Governing Committee v. Norris*, 463 U.S. ——, 103 S.Ct. 3492 (1983) (per curiam), the Court reaffirmed its decision in *Manhart* by holding that the use of sex-segregated tables by third-party insurers operating a deferred compensation plan for Arizona state employees violated Title VII. Once again, however, the Court declined to apply its holding retroactively, ruling instead that sex-segregated tables could not be used to calculate benefits based on contributions to be made on or after August 1, 1983. 103 S.Ct.

---

[21] Pet. App. 24a.

at 3493. Explaining its remedial ruling, the Court stated that the equitable considerations counseling in favor of prospective relief in *Manhart* were "no different" in *Norris*. Because of the existence of a lump-sum option under the Arizona retirement plan, an option not offered by the employer in *Manhart*, the Court found that the employer in *Norris* "reasonably could have assumed" that the plan was lawful under Title VII. The Court also expressed concern over the "devastating results" for state-supported pension plans that would attend the imposition of retroactive liability. 103 S.Ct. at 3510 (Powell, J., concurring in part).

On the same day that *Norris* was decided, the Court vacated the prior judgment of the Second Circuit Court of Appeals in this case and remanded the case to that court "for further consideration in light of [*Norris*]...." 103 S.Ct. 3565 (1983). The issue now before the Court is whether the subsequent decision of the Second Circuit in this case comports with *Norris*. With respect to liability issues under Title VII, the answer is plainly yes. This Court held in *Norris* that the practice of paying different employment-related benefits to male and female retirees solely on account of sex violates Title VII and is not excused by either the McCarran-Ferguson Act or the delegation of operating authority to third-party insurers selected by the employer. The decision of the court below is fully consistent with *Norris* on these counts, and does not raise a substantial or novel question of federal law warranting review in this Court.[22]

The petition also challenges the appropriateness of the remedy fashioned by the court below. That remedy requires TIAA-CREF to use sex-neutral mortality tables in

---

[22] We will make no further mention of the petitioners' assertion that the McCarran-Ferguson Act, 15 U.S.C. §§ 1101 *et seq.* (1982), insulates insurance companies from potential liability under Title VII. The Court's decision in *Norris* "lay[s] the matter to rest." 103 S.Ct. at 3500 n.17 (Marshall, J., concurring in part).

calculating periodic annuity benefits for all similarly situated participants, male and female, who retire on or after May 1, 1980. The remedy, therefore, affects benefits based on contributions made prior to the date of the trial court decision. While *Norris* does not proscribe such a remedy in every case, it does suggest that courts should be sensitive to certain equitable factors in determining whether to invoke the usual Title VII presumption in favor of retroactive relief. The court below correctly identified and applied the *Norris* factors, and correctly concluded that the same factors militating against retroactive relief in *Norris* apply differently here and do not command the same result. The petitioners' argument to the contrary, we assert, is neither sound enough nor substantial enough to merit plenary consideration in this Court.

ARGUMENT

I. The Remedy Fashioned by the Court Below is Consistent with the Equitable Remedial Principles Elucidated in *Arizona Governing Committee v. Norris.*

We address first the argument upon which TIAA-CREF principally relies in its petition: that the remedy fashioned by the court below does not comport with *Norris.*

Norris reaffirms and relies upon the remedial holdings in prior decision of this Court. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court delimited the remedial discretion of trial courts in Title VII cases. Quoting from the legislative history of Title VII, the Court observed that the statute was "intended to give the courts wide discretion [in] exercising their equitable powers to fashion the most complete relief possible." 422 U.S. at 421 (quoting 118 CONG. REC. 7168 (1972) (remarks of Senator Williams)). Courts not only can order "the elimination of the particular unlawful employment practice complained of," but under appropriate circumstances can fashion make-whole remedies designed to

restore plaintiffs "to a position where they would have been were it not for the unlawful discrimination." *Id.*

As the Court later observed in *Manhart*, *Albemarle* creates a presumption in favor of retroactive relief in Title VII cases, a presumption that "can seldom be overcome." 435 U.S. at 719. The repeated references to *Albemarle* in *Manhart* and *Norris* demonstrate that the Court did not intend to foreclose the possibility of retroactive relief in subsequent pension cases. *Manhart* held that a trial court must demonstrate "equitable sensitivity to the impact of a [retroactive] order" (435 U.S. at 720 n.36)—something altogether different from the petitioners' assertion that retroactive relief is never appropriate in Title VII pension cases.[23]

The Court in *Norris* identified three equitable factors for determining the appropriateness of retroactive relief in particular cases. The first, and arguably the most important, is whether a retroactive remedy is necessary to further "the central statutory purposes" of eradicating employment discrimination and making the plaintiff whole for injuries caused by unlawful employment practices. *Albemarle*, *supra*, 422 U.S. at 421. *See Norris*, *supra*, 103 S.Ct. at 3512 n.3 (O'Connor, J., concurring). The second is whether prior rulings "clearly foreshadowed" the decision, thus allowing the court to draw a reasonable inference that the defendant should have known that the conduct complained of would give rise to statutory liability. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *Norris*, *supra*, 103 S.Ct. at 3512 (O'Connor, J., concurring). Finally, courts ask whether the imposition of retroactive liability will produce "substantial inequitable results" for parties affected by the order. *Cipriano v. City of Houma, Louisiana*, 395 U.S. 701, 706 (1969) (per curiam); *Norris*, *supra*, 103 S.Ct. at 3512 (O'Connor, J., concurring).

---

[23] Pet. 10 ("*Norris* squarely rejects retroactivity").

The Court applied these factors in *Norris* and found that, due to circumstances and characteristics special to the Arizona plan, the second and third factors counseled against retroactive relief.[24] The Court held that because of the existence of a lump-sum option under the Arizona plan (an option not available to employees in *Manhart*), the State of Arizona "reasonably could have assumed" that its plan complied with Title VII by fitting within the "open market" exception that *Manhart* specifically embraced. 103 S.Ct. at 3510 (Powell, J., concurring in part). The Court also noted that the Arizona plan (like the municipal plan in *Manhart*) was publicly funded, and expressed fear that retroactive relief would impose "unanticipated financial burdens . . . [on] States and local governments," and through them "on the public." *Id.*

The issue for the court below on remand was whether these equitable factors commanded the same result in this case. The court determined that they did not because the TIAA-CREF plan differed in critical respects from the plan offered to Arizona employees in *Norris*.

In the first place, the decision of the court below was very clearly foreshadowed by *Manhart* and did not come as a surprise to the petitioners. TIAA-CREF participants are not given the option enjoyed by Arizona employees of receiving their retirement savings in the form of a lump sum. While Arizona may reasonably have believed that the lump-sum option distinguished its plan from the Los Angeles plan declared illegal in *Manhart*, TIAA-CREF was indisputably on notice that its plan was illegal under *Manhart*. When TIAA-CREF tried to persuade the court below that the decision in this case

---

[24] With respect to the first factor—whether retroactive relief would further the central statutory purposes underlying Title VII—the Court reached no conclusion. Only Justice O'Connor addressed this factor. Her view was that retroactive relief was not required to ensure that pension plan operators abandoned the use of sex-based mortality tables. 103 S.Ct. at 3512 (O'Connor, J., concurring).

was not clearly foreshadowed by *Manhart*, the court disagreed:

> . . . *Manhart* was decided by the Supreme Court over four years ago. Since the decision of that case a number of federal district courts and courts of appeals have declared plans like those at issue here to be unlawful in light of *Manhart*. The record further indicates that in 1974, as a result of the Secretary of Labor's public request for comments on proposed sex discrimination guidelines, TIAA-CREF wrote to its member institutions in order to encourage them to oppose regulations requiring the use of gender-neutral mortality tables. . . . [TIAA-CREF has] had ample opportunity to "voluntarily" revise their mortality tables. The possibility of an order such as that entered by the district court, and by this court today, was foreseeable at least since 1974.[25]

More important, the record in this case shows that the remedy ordered by the court below would impose no significant costs on TIAA-CREF. The potentially devastating financial repercussions feared by the Court in *Norris* are absent here. The remedy fashioned below is different and far less sweeping than the remedies adopted by the lower courts in *Manhart* and *Norris*. In those cases, employers were required to adjust contributions or benefits for women to bring them in line with the more favorable levels enjoyed by men; the result in each case was to impose new obligations on fund reserves, obligations so burdensome that they arguably threatened the solvency of the pension systems. Here, by contrast, the court below took advantage of the unique characteristics of the TIAA-CREF system to fashion a remedy that compels equalization of future benefits without changing the total anticipated obligations on reserves.[26] The court observed:

---

[25] Pet. App. 32a-33a (citations omitted).

[26] As the trial court observed, the relief ordered in this case "will merely vary the future allocation and distribution of an unaffected amount of assets. For this reason, the Court believes that

> [T]he "retroactive" relief awarded here is not nearly so drastic as that sought by plaintiffs and awarded by the district court in *Manhart*. There the district court's order . . . required Plan administrators to remove money from the fund for this purpose. The fund would nevertheless have been required, at the same time, to meet undiminished obligations. In the present case *a "retroactive" award does not require the wholesale removal of moneys from TIAA-CREF reserves.* The equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds.[27]

These factual findings, we believe, are well-supported by the record and not affected by anything this Court said or did in *Norris*.

Finally, the court below concluded that retroactive relief was the only remedy that could achieve the statutory goal of eradicating discrimination. The court, quoting *Albemarle*, held that any other form of relief "would fly in the face of the primary purpose of Title VII—to 'make persons whole for injuries suffered on account of unlawful employment discrimination.'" [28] It would be anomalous, the court observed, to invalidate the use of sex-based tables while at the same time "postpon[ing] full conversion to gender-neutral tables for as much as 30 to 40 years." [29] That was true before *Norris* and it is still true today.

In sum, the court below properly applied the equitable factors identified in *Norris* to the TIAA-CREF retirement plan and determined that, under the facts presented here, a retroactive remedy was feasible and appropriate.

---

the remedy it has fashioned does not involve impermissible retroactive relief within the meaning of *Manhart*." Pet. App. 89a.

[27] Pet. App. 33a-34a (emphasis added).

[28] Pet. App. 37a.

[29] Pet. App. 34a.

That conclusion, premised on the unique financial and organizational characteristics of TIAA-CREF, neither departed from nor enlarged upon the analytic approach utilized by this Court in *Albemarle*, *Manhart*, and *Norris* for gauging the propriety of retroactive relief under Title VII.

The petitioners argue that the remedy fashioned below is unfair to the class of male participants who, by virtue of their higher aggregate mortality rate, will end up subsidizing to some extent the benefits paid to the class of female participants.[30] This argument was specifically addressed and rejected in *Manhart*, where the Court observed that the subsidization of one beneficiary class by another "is a common practice that has never been considered inherently unfair." 435 U.S. at 710. To the suggestion that a gender-neutral pension plan would discriminate against male employees, the Court responded that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. [Our decisions do] not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Id.* at 710-11 n.20 (emphasis in the original).

On a more fundamental plane, TIAA-CREF's reliance on aggregate benefits for classes of male and female retirees perpetuates the very sex stereotyping the Court condemned six years ago in *Manhart* and again last year in *Norris*. The only way TIAA-CREF can determine the size of the cross-subsidy paid by the *class* of male retirees to the *class* of females is by categorizing employees on the basis of their sex and then making generalizations about the expected longevity of class members. *Norris* holds that it is illegal to impute a sexually linked class characteristic—even a true one—to individual class members as to whom the generalization may not apply:

---

[30] Pet. 14-16.

"Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class.'" 103 S.Ct. at 3498 (Marshall, J., concurring in part) (emphasis in the original), quoting *Manhart*, *supra*, 435 U.S. at 708. TIAA-CREF's insistence on dividing participants for analytic purposes into two separate classes, male and female, cannot be reconciled with the conclusion in *Manhart* and *Norris* that employees must be treated as a single, sexually integrated group.

TIAA-CREF also argues that, unless the petition for certiorari is granted, additional litigation will be generated by the Second Circuit decision. TIAA-CREF cites thirteen cases currently pending in the lower federal courts, and suggests that more litigation will ensue unless the Court grants certiorari and adopts a rule barring retroactive relief in all pension cases.[31]

As the petition acknowledges, eight of the thirteen pending cases involve pension plans operated by TIAA-CREF. If the petition for certiorari is denied, the changes TIAA-CREF will then be required to make in the calculation and payment of retirement benefits will resolve those eight cases immediately. The remaining five cases do not constitute, in our judgment, an unreasonable or unmanageable burden for the lower federal courts. Nor is that burden likely to increase significantly in the future, since defined contribution plans such as TIAA-CREF's—the only plans, in practical terms, that make distinctions between male and female participants based on sex-linked mortality differences—cover only a small proportion of American pension plan participants.[32]

---

[31] Pet. 12 n.4 and accompanying text.

[32] The United States Department of Labor estimates that 30.5 million American workers are active pension plan participants. Only ten percent of those workers rely on defined contribution plans as their primary source of retirement income. The vast majority—

Norris indicates clearly that courts, in fashioning remedies in Title VII pension cases, should be sensitive to certain equitable considerations. *Norris* leaves to the lower federal courts the task of determining the equities in particular cases—a task to which the lower courts are well suited. When equitable considerations govern, there is no reasonable alternative to the kind of fact-specific, case-by-case adjudication represented by the decision of the court below in this case; certainly the invitation to fashion inflexible rules is not in the spirit of equitable jurisprudence. "The essence of equity jurisdiction has been the power of the Chancellor . . . to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Company* v. *Bowles*, 321 U.S. 321, 329 (1944).

The remedy ordered by the court below, in sum, is not unfair to male participants individually or collectively. The Court considered and rejected the same claim of inequity when it was asserted on behalf of male employees six years ago in *Manhart*. The petitioners have not shown that the decision of the court below was incorrect or in conflict with the decisions of other courts of appeals or this Court. There is no reason, accordingly, for the Court to grant review on the issue of remedy.

II. The Decision of the Court Below on Liability Issues is Not in Conflict with the Decision of Any Other Federal Appellate Court.

We next address TIAA-CREF's contention that it is not subject to the antidiscrimination provisions in Title VII because it does not "employ" the complaining female participant.

---

ninety percent of all pension plan participants—receive their sole or primary pension benefits from defined benefit plans, most of which calculate periodic retirement benefits on a sex-neutral basis. U.S. DEP'T OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS 8-9 (1983).

Contrary to the assertion in the petition,[33] there is no conflict between the circuits on this question. The Sixth Circuit decision in *Peters v. Wayne State University*, 691 F.2d 235 (1982), invoked by the petitioners as the source of the conflict, was subsequently vacated by this Court, and the case is now pending in the United States District Court for the Eastern District of Michigan.[34] The petitioners cite no other case, and we know of none, that is inconsistent with the ruling of the court below on the question of TIAA-CREF's exposure to liability under Title VII.[35]

---

[33] Pet. 16.

[34] 463 U.S. ——, 103 S.Ct. 3566 (1983), *remanded mem.*, 718 F.2d 1100 (6th Cir. 1983).

[35] TIAA-CREF neglects to mention in its petition that after this Court vacated the decision in *Peters*, the Sixth Circuit decided a case that may have changed the law of that circuit on this very question. The issue in *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), was whether salesmen paid commissions in lieu of salaries were "employees" of the defendant company for Title VII purposes. The company had successfully argued in the trial court that the salesmen were "independent contractors," as distinguished from statutory employees. On appeal, the Sixth Circuit reversed. "Since this statute has been universally held to be broadly remedial in its purpose," the court began, "such remedial effect can be given only upon a broad interpretation of the term employee. We are unpersuaded that the term 'employee' was meant in a technical sense, divorced from the broadly humanitarian goals of the Act." 711 F.2d at 1340-41. The court then fashioned a new test for determining whether particular complainants merit Title VII's protection:

> [O]ne must examine the *economic realities* underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate . . . . [Title VII covers] all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded. Were there a doubt or

The lower federal courts have uniformly held that Title VII extends beyond the conventional employer-employee relationship. The statute reaches "agents" of an employer, employment agencies, and labor organizations, none of which "employs" potential Title VII complainants in the ordinary sense of that term.[36] Rather than prohibiting discrimination against "employees," the statute prohibits discrimination against "any *individual*" on account of "such *individual's*" race or sex[37]—"a strong indication," in the words of one appellate court, "that the proscriptions contemplated by Section 703(a)-(1) reach beyond the immediate employment relationship."[38]

The consistent approach of the lower federal courts on this question and the absence of any conflict between the circuits regarding the potential liability of TIAA-CREF under Title VII suggest that there is no reason for the Court to grant review on this issue.

---

ambiguity in the matter, we would resolve it in favor of coverage.

Id. at 1340, 1341 (emphasis added).

In sum: Not only was *Peters*, the single case cited by TIAA-CREF as the source of a conflict between the circuits, subsequently vacated; but there is every reason to believe that, when *Peters* again reaches the Sixth Circuit, the "economic realities" test subsequently adopted in that circuit will impel a result contrary to the one reached in *Peters* the first time around.

[36] Civil Rights Act of 1964 §§ 701(b), 703(b), (c), 42 U.S.C. §§ 2000e(b), 2000e-2(b), (c) (1982). *See Sibley Mem. Hospital v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

[37] Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)-(1) (1982) (emphasis added).

[38] *Sibley Mem. Hospital, supra*, 488 F.2d at 1341. *Accord, Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983). *See Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977); *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979); *Puntolillo v. New Hampshire Racing Comm'n*, 375 F. Supp. 1089, 1091-92 (D.N.H. 1974).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ANN H. FRANKE
LAWRENCE WHITE
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

JOHN L. POTTENGER, JR.
(Counsel of Record)
Yale Law School
Box 401A Yale Station
New Haven, CT 06520
(203) 436-2210

Counsel for the American Association of University Professors

Of Counsel:
RALPH S. BROWN
127 Wall Street
New Haven, CT 06520

August, 1984